

ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-00491-SCT

WILLIE MANNING

**FILED**

4:30  
WDX

PETITIONER

v.

APR 26 2013

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

STATE OF MISSISSIPPI

RESPONDENT

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**MOTION FOR REHEARING**

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Petitioner, Willie Manning, through counsel, respectfully seeks rehearing pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure to bring to the Court's attention matters that were "overlooked or misapprehended" in its recent order denying Petitioner's motion for leave to file successive petition for post-conviction relief to proceed in the trial court on a motion for post-conviction relief. Manning addresses the request for DNA and other forensic testing and the claim arising under *Batson v. Kentucky*, 476 U.S. 83 (1986).

For the DNA claim, the Court overlooked the undisputed evidence that the technology for testing much of the biological evidence, primarily hair evidence, was not available at the time of trial. Furthermore, when examining whether Manning demonstrated that DNA testing may have affected the outcome of his trial, the majority focused solely on the prosecution's trial evidence, and in the process, overlooked not only the substantial defense case at trial but also the wealth of evidence produced in an earlier PCR action that eroded whatever credibility the State's witnesses had.

For the *Batson* claim, the majority completely overlooked the critical threshold issue that would have allowed it to circumvent the State's res judicata defense, namely, the intervening

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United States Supreme Court decisions in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), that made clear that this Court had erroneously failed to conduct a comparative juror analysis or examine the complete record in determining whether the prosecutor exercised peremptory strikes in a racially discriminatory manner.

I. Matters Overlooked in Denying DNA and Forensic Testing

A. Testing was not previously available.

The majority suggests that the request for DNA and forensic testing should be denied because in 1994, the trial court granted defense counsel the opportunity to inspect all physical evidence. Order at 1, n.1. It is uncontested, however, that the type of DNA testing available in 1994 was insufficient to test items such as hair evidence. Nina Morrison, a Senior Attorney with the Innocence Project, noted that the type of testing now requested was not available at the time of Manning's trial. Moreover, the State has never challenged this assertion. Because the biological evidence had not been – and could not have been – subjected to prior DNA testing, this Court should grant rehearing.

B. The majority failed to consider the complete trial and post-conviction record

The majority found that “conclusive, overwhelming evidence of guilt was presented to the jury,” and thus Petitioner could not show that there was a reasonable probability that he would not have been convicted. Order at 2. The majority highlighted the evidence that the prosecution used to secure Manning's conviction. However, the majority overlooked both the strenuous challenge of the State's case made during trial as well as the substantial record developed in prior post-conviction proceedings.

Petitioner discussed the flaws and gaps in the State's evidence on pages 8-26 of his motion. Some of these points include:

- Evidence at trial casting doubt that certain items taken in a car robbery could be linked to Manning;
- The failure of the FBI to corroborate a leather jacket could be matched to jacket taken during the car robbery;
- Prior inconsistent statements from Paula Hathorn about whether she saw Manning fire a gun at a tree;
- Hathorn's status as an informant, her enormous reward, and undisclosed deal with the State;
- Numerous inconsistent statements by Hathorn contained on secret recordings and her willingness literally to say anything that the sheriff asked her to say;
- Frank Parker's remarkable record of dishonesty;
- Earl Jordan's improbable "confession" involving four people in a two-seater car when one of those four was actually in Alabama at the time of the crime;
- Jordan's inconsistent statements and motivation to assist the State;
- Jordan's ability to pass a polygraph test implicating someone else in the crimes even before he supposedly heard Manning "confess;"
- Alibi witnesses who saw Manning at the 2500 Club.

Review that focuses solely on the prosecutor's case will almost always result in a finding adverse to a petitioner seeking DNA testing. However, the likely effect of DNA testing cannot be so lightly dismissed when each facet of the State's case is challenged, and the State's witnesses are criminals with histories of fabricating events and with overwhelming incentives to help the State.

As Nina Morrison points out in her affidavit, numerous individuals have been exonerated through DNA testing of hair. Also, a number of individuals have been exonerated even though the evidence of guilt may have seemed overwhelming, including, as in the case of Kurt Bloodsworth, eyewitness testimony. See, Sara Rimer, *Life After Death Row*, N.Y. Times Magazine, Dec. 10, 2000 (link found at <http://www.deathpenaltyinfo.org/node/1870>) .

Moreover, in Mississippi a number of individuals, including former death row inmate Kennedy Brewer, have been released due to post-conviction DNA testing. The testing of available biological evidence would never have come about if the reviewing court had looked exclusively at the State's case.

The majority also dismisses the potential strength of the results of DNA testing, concluding that the absence of Manning's DNA "does not preclude his participation in the crimes charged." Order at 4. This conclusion is flawed for two reasons. First, it stems from a misapplication of the reasonable probability standard found in the statute. Manning need only show a reasonable probability that he would not have been convicted, which is not as onerous as having to prove that the results would completely rule out any possibility of involvement on his part. Second, the Court does not consider the very real likelihood that DNA testing would show that the hairs, including those found on the victims' bodies or the rape kit, came from the same person. It would be especially telling if that person had no connection to Manning or had been involved in similar incidents in the past.

The Court should not allow the execution to proceed without first taking all reasonable steps available to ensure the accuracy of the conviction. The post-conviction statute allows for DNA testing under the circumstances presented here. For these reasons, the Court should grant rehearing.

## II. Petitioner Relied on Intervening Decisions to Overcome the Res Judicata Bar

The majority failed to address Petitioner's reliance on intervening decisions to overcome the res judicata bar. Petitioner anticipated that the State would raise the res judicata defense and argued that the post-conviction statute provides an important exception to the res judicata bar for intervening decisions of the United States Supreme Court. *See* Mot. at 42-47. As Petitioner noted, this Court previously declined to conduct comparative juror analysis and even found *Batson* claims procedurally barred, despite an objection at trial, unless the defense specifically rebutted each rationale offered by the prosecution to justify a strike. Without considering the effect of the intervening decisions, however, the majority denied relief on the *Batson* claim on the grounds of res judicata.

This Court's previous approach was inconsistent with *Batson*, but that point was not made clear until the United States Supreme Court decided *Miller-El v. Dretke*, 545 U.S. 231 (2005). In that case, as well as *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Supreme Court made it clear that a reviewing court had the obligation to review the entire record from trial to assess whether the prosecutor exercised strikes on the basis of race, and that the reviewing court was not limited to considering only arguments advanced by defense counsel before the trial judge.

Petitioner is asking this Court to follow the example set by the Texas Court of Criminal Appeals. Like Mississippi, Texas has an exception to a res judicata bar for intervening decisions. After *Miller-El* was decided the Texas court allowed prisoners to proceed with successive writs because *Miller-El* showed that the Texas courts had not been applying *Batson* correctly. *See Ex parte Arthur Williams*, 2009 WL 1165504 (Tex. Crim. App. Apr. 29, 2009).

There can be no serious dispute that the jury selection was tainted by racial discrimination. African-Americans were tossed off the jury for doing no more than reading publications marketed to African-Americans. In numerous instances, the prosecutor gave reasons that were simply inconsistent with the record or equally applicable to white jurors. Such discrimination violates not just Manning's rights but the rights of the jurors themselves, and it casts a long shadow over the integrity of the judicial system of this State. When this Court addressed the issue before, it did not have the benefit of the additional guidance from the United States Supreme Court and Fifth Circuit. In light of those intervening decisions, this Court should grant rehearing.

Conclusion

Wherefore, for the foregoing reasons, Petitioner requests this Court grant his motion for rehearing.

Respectfully submitted April 26, 2013.

WILLIE JEROME MANNING

By:   
COUNSEL FOR PETITIONER

Of Counsel:

David P. Voisin (MSB #100210)  
David P. Voisin, PLLC  
P. O. Box 13984  
Jackson, MS 39236-3984  
(601) 949-9486

Robert S. Mink (MSB #9002)  
Wyatt, Tarrant & Combs, LLP  
4450 Old Canton Road, Suite 210  
Jackson, MS 39211  
(601) 987-5324

**CERTIFICATE OF SERVICE**

I, David P. Voisin, hereby certify that I have served this day a copy of the foregoing Motion to counsel for Respondents:

Marvin L. White, Jr.  
Jason L. Davis  
Office of the Attorney General  
P. O. Box 220  
Jackson, MS 39205-0220

April 26 2013.

  
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DAVID P. VOISIN (MSB #100210)